

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

6 LEHMAN BROTHERS HOLDING, INC. et al.

7 - - - - -x

8 Case No. 08-01420-scc

9 LEHMAN BROTHERS, INC.

10 - - - - -x

11

12 United States Bankruptcy Court

13 One Bowling Green

14 New York, New York 10004

15 August 12, 2014

16 10:00 AM

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20 B E F O R E:

21 HON. SHELLEY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

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25 ECRO: UNKNOWN

1 Conference for  
2 [Adversary Proceeding No. 10-03542]; [Adversary Proceeding No.  
3 10-03544]; [Adversary Proceeding No. 10-03545]; [Adversary  
4 Proceeding No. 10-03809]; [Adversary Proceeding No. 10-03811]  
5  
6 HEARING re Doc # 24762, 24881 - Omnibus Application of  
7 Individual Members of Official Committee of Unsecured Creditors  
8 and Indenture Trustees Pursuant to Section 1129(a)(4), Or,  
9 Alternatively, Sections 503(b)(3)(d) and 503(b)(4) of  
10 Bankruptcy Code for Payment of Fees and Reimbursement of  
11 Expenses

12  
13 HEARING re Doc #8408 - Trustee's Objection to the General  
14 Creditor Proof of Claim of Connie & Curtis Gale (Claim No.  
15 7000142)

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25 Transcribed by: Theresa Pullan

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES LLP

4 Attorneys for Debtors

5 767 Fifth Avenue

6 New York, NY 10153

7 BY: LEE JASON GOLDBERG, ESQ.

8

9 DIAMOND MCCARTHY, LLP

10 Attorneys for JA Hokkaido Shinren

11 Two Houston Center

12 909 Fannin, 15th Floor

13 Houston, Texas 77010

14 BY: STEPHEN T. LODEN, ESQ.

15

16 WOLLMUTH MAHER & DEUTSCH LLP

17 Attorneys for LBSF

18 500 Fifth Avenue

19 New York, New York 10110

20 BY: WILLIAM F. DAHILL, ESQ.

21

22

23

24

25

1 COVINGTON & BURLING LLP

2 Attorneys for Wilmington Trust

3 The New York Times Building

4 620 Eighth Avenue

5 New York, NY 10018

6 BY: DIANNE COFFINO, ESQ.

7

8 OFFICE OF THE UNITED STATES TRUSTEE

9 U.S. Federal Office Building

10 201 Varick Street, Room 1006

11 New York, NY 10014

12 BY: ANDREA B. SCHWARTZ, ESQ.

13 SUSAN D. GOLDEN, ESQ.

14

15 HUGHES HUBBARD

16 Attorneys for SIPA Trustee

17 One Battery Park Plaza

18 New York, NY 10004

19 BY: AMINA HASAN, ESQ.

20 JEFFREY S. MARGOLIN, ESQ.

21

22 MEISSNER & ASSOCIATES

23 BY: STUART D. MEISSNER, ESQ.

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P R O C E E D I N G S

THE CLERK: Please have a seat.

THE COURT: Good morning. Some of you who are here frequently may notice some new faces in the courtroom this morning. Our Court is hosting some distinguished visitors from the United Arab Emirates who are here to observe our bankruptcy system to form their own developing bankruptcy system and they are most welcome and are particularly interested in attending a hearing in one of the largest and most important bankruptcy cases of all time. So those are the faces that you see in the courtroom today. Okay, good morning.

MR. GOLDBERG: Good morning, Your Honor, Lee Goldberg of Weil Gotschal and Manges for Lehman Brothers Holdings, Inc. and its affiliated chapter 11 estates. Your Honor, we are here for the Seventy-Sixth Omnibus and claims hearing.

We start this morning's calendar with a scheduling conference for the five non-distributed actions. These are the derivatives related avoidance actions where the defendants are the trustees and the SPD issuers, and the funds that are the subject of the disputes remain in possession of the SPD issuers themselves.

On May 15th Your Honor entered an order extending the litigation stay for the non-distributed actions. The May 15th stay order contemplated that the chapter 11 estates would have filed and served a proposed scheduling order governing the non-

1 distributed actions by July 28th, 2014. The chapter 11 estates  
2 failed to file and serve the proposed scheduling order by that  
3 date, so the chapter 11 estates conferred with the defendants  
4 in the non-distributed actions regarding a revised timetable  
5 for submitting the scheduling order.

6 Your Honor, today the plan administrator is seeking a  
7 bridge order that briefly extends the litigation stay which is  
8 scheduled to expire on August 14th and implements the agreed  
9 timetable for submission of the proposed scheduling order.  
10 Bank of New York Mellon and U.S. Bank, the trustees which  
11 themselves are defendants in the non-distributed actions and  
12 which also represent the SPD issuer defendants, have agreed to  
13 the proposed bridge order. Your Honor, I have a copy of the  
14 proposed bridge order.

15 THE COURT: Thank you.

16 MR. GOLDBERG: Your Honor, according to the bridge  
17 order, the plan administrator will file a proposed scheduling  
18 order within 14 days of entry of the bridge order. As the plan  
19 administrator has previously described to Your Honor, the  
20 proposed scheduling order for the non-distributed actions will  
21 effectively mimic the scheduling order that Your Honor has  
22 already entered for the distributed action -- that's adversary  
23 proceeding 10-03547, except that for example there would be no  
24 class certification issues.

25 Your Honor, after the plan administrator files a

1 proposed scheduling order, the defendants in the non-  
2 distributed actions will have 14 days to file written  
3 objections to the proposed scheduling order. The plan  
4 administrator and the defendants will then have a certain  
5 period of time to resolve any issues regarding the proposed  
6 scheduling order. If the parties are unable to agree on the  
7 terms of a proposed scheduling order, then the dispute will be  
8 set for a hearing before the Court. In the interim, Your  
9 Honor, the litigation stay with respect to the non-distributed  
10 actions would be continued until entry of the scheduling order.

11 Your Honor, that concludes my presentation, if you  
12 have any questions.

13 THE COURT: All right. Does anyone else wish to be  
14 heard with respect to the proposed bridge order as described?  
15 All right. We'll enter that today. Thank you very much.

16 MR. GOLDBERG: Thank you, Your Honor.

17 Your Honor, the next matter on the calendar is a  
18 scheduling conference for the Motion of JA Hokkaido in the  
19 distributed action that I referred to, Adversary proceeding,  
20 10-03547. Mr. Dahill from Wollmuth Maher and Deutsch will  
21 handle that.

22 THE COURT: Okay, very good. Thank you.

23 MR. GOLDBERG: Thank you, Your Honor.

24 MR. DAHILL: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. DAHILL: William Dahill from Wollmuth Maher and  
2 Deutsch for LBSF in the distributed action litigation.

3 THE COURT: All right.

4 MR. DAHILL: As Your Honor knows --

5 THE COURT: And who is here for JA Hokkaido?

6 MR. LODEN: Good morning, Your Honor, Steve Loden of  
7 Diamond McCarthy on behalf of the movants, JA Hokkaido.

8 THE COURT: Okay. There's an unfortunate amount of  
9 correspondence and bickering going on over what are  
10 fundamentally simple discovery issues. So let's just try to be  
11 as efficient as possible and resolve it.

12 MR. LODEN: Absolutely.

13 THE COURT: Based on my reading of everything that  
14 you've submitted, the primary areas of contention include what  
15 happens if you can't get the depositions scheduled in time and  
16 under what circumstances and by what standard there would be an  
17 extension of time.

18 MR. LODEN: Correct.

19 THE COURT: Which I really think is just a lot of  
20 words around nothing. But you can try to convince me that  
21 there's a meaningful difference between the words that each of  
22 you are urging; and secondly, the scope of the documents that  
23 need to be produced. So is there any further progress between  
24 the two of you on the open issues?

25 MR. DAHILL: Your Honor, if I might, there's one

1 other issue that I believe is also important and it comes out  
2 of the order of paragraph 7 which is the --

3 THE COURT: And that's the participating on the class  
4 --

5 MR. DAHILL: That's correct. Or what happens at the  
6 end if there's not. And I'm prepared to address any of those  
7 matters.

8 THE COURT: So why don't you start at the top, and  
9 should we talk about the deposition first?

10 MR. DAHILL: Your Honor, we are prepared to, I mean  
11 Mr. Logan attached to his papers the information about the  
12 process for engaging. We are prepared. We will, we believe we  
13 will meet the schedule, there are rooms available within the  
14 timeframe proposed by counsel, there is plenty of time, if need  
15 be, we will obtain local counsel to appear for us if there's  
16 any Visa issues.

17 THE COURT: Okay.

18 MR. DAHILL: The only issue that we raise was rather  
19 than having a standard, using a good cause standard if we're  
20 unable to do that despite our efforts, I agree with you, I  
21 don't, if we have the same understanding of what both language  
22 -- I'm trying to --

23 THE COURT: You're going to try your best to get it  
24 done, and if for some reason that's beyond your control, you  
25 can't get it done in that time, there's going to be an

1 extension. I mean that's the way I would articulate it.

2 MR. DAHILL: That's all we've asked for.

3 THE COURT: Whether it's the words you used or it's  
4 the words you used.

5 MR. DAHILL: I don't think the wording is necessarily  
6 as important as the clarifications that have been made on the  
7 record today, which is why we pressed the issue.

8 MR. LODEN: Thank you, Your Honor.

9 THE COURT: Okay.

10 MR. LODEN: We can deal next, still within the order  
11 is the question of the participation within the class  
12 certification process. Your Honor, one way to look at this is  
13 if there is a determination by JA Hokkaido that they don't want  
14 to participate in the process of responding to discovery which  
15 has already been served on all the known defendants and/or does  
16 not want to participate in the briefing as a result of not  
17 participating in discovery, they could be treated as any other  
18 defendant who may not participate. But the only point, the  
19 problem that we've had with the language is that they at the  
20 end of that process, if they don't succeed on that motion,  
21 wanted to then I guess start all over again class cert as to  
22 them. And that's what's objectionable to us.

23 THE COURT: Right. And I agree with that. I mean  
24 you know we're going to proceed to resolve the jurisdictional  
25 issue which I view is very important. I don't know what the

1 answer is, but it's a serious issue. But in the meantime, you  
2 know, the train is going to leave the station, there are dozens  
3 of other parties on the train, and you can participate in that  
4 or not. But there's not going to be a do over if at the end of  
5 the day, you know, the train has gotten three-quarters of the  
6 way down the track and it's, there's a determination from the  
7 Court that in fact there is jurisdiction, and as I sit here, of  
8 course, I don't know the answer to that. But there has to be a  
9 balancing of burden versus efficiency, and I think the way that  
10 that has to come out is that you can go along and your  
11 interest, you can either actively protect your own interest or  
12 you can in a sense rely on the other parties similarly  
13 situated, you know, to advance the positions that the  
14 defendants all want to advance.

15 MR. DAHILL: Well if I may, Your Honor, attempt to  
16 push back a little bit on that point. We originally pushed for  
17 a hearing on our motion for leave to file a motion to dismiss  
18 back in June of last year, and withdrew that motion voluntarily  
19 without prejudice before you actually took over this case, all  
20 this happened, and attempted to work out amicably with Lehman  
21 counsel some discovery and things like that to hopefully  
22 resolve this issue without Court involvement at all. We waited  
23 months for that to occur and it never occurred. So we re-filed  
24 the motion again in March of this year and that re-filing was  
25 prompted because Lehman was attempting again to sweep our

1 client up with the hundreds of other defendants into ADR, into  
2 class cert merits litigation before the personal jurisdiction  
3 issues, which you characterized as important, and of course we  
4 agree, had been resolved. So we re-filed our motion and we  
5 argued strenuously before you several months ago that before we  
6 get into merits-based litigation, the jurisdictional issues  
7 should be resolved. They have not yet been resolved. I'm now  
8 hopeful that since we do have large agreement on the scheduling  
9 order that they will be resolved soon. But we're still in the  
10 same position we were back in June of last year.

11 THE COURT: Well let's be practical, okay, so let's  
12 be practical. When do you believe that you'll be prepared for  
13 a hearing on the jurisdiction motion?

14 MR. DAHILL: We could be prepared next week.

15 THE COURT: Well.

16 MR. DAHILL: The schedule which was proposed by Mr.  
17 Loden asked for a schedule, a hearing in the beginning of  
18 December I believe, I forget the date. It's a date that was  
19 proposed by JA Hokkaido.

20 THE COURT: And is that driven by the time that it  
21 takes to get the deposition?

22 MR. DAHILL: Several things. The deposition deadline  
23 as proposed is October 31st. I presume that counsel will want  
24 documents before the deposition. I would if I were in their  
25 shoes.

1 THE COURT: Why is the deposition deadline so far  
2 away?

3 MR. DAHILL: We can make it closer.

4 THE COURT: Is it because of the logistical issues of  
5 conducting the deposition in Japan?

6 MR. DAHILL: There appears to be, Your Honor, based  
7 on speaking with, there's services that you speak with, and  
8 again Mr. Loden had a very helpful printout from the U.S.  
9 Consulate in Japan. It appears to be there's a minimum of six  
10 weeks that would be required to get it going. I think we're  
11 talking, the day we're talking is roughly ten weeks, eight to  
12 ten weeks out. And as Mr. Loden suggested, we're probably  
13 looking at getting, hopefully getting some additional documents  
14 which then need to be translated based upon what we received  
15 last time which were documents and a lot of them numerical  
16 documents that are written in Japanese. I mean it may well be  
17 that there's a couple of weeks there that could be moved, but  
18 it's not a big difference.

19 THE COURT: Okay. So there's no possibility, so the  
20 deposition must take place in Japan?

21 MR. LODEN: According to agreements between the  
22 countries of the United States and Japan, the deposition has to  
23 take place in Japan. The U.S. Embassy in Tokyo, their website  
24 says that Japan considers it an infringement upon their  
25 judicial sovereignty for a Japanese citizen to be deposed

1 anywhere other than the U.S. Embassy in Tokyo or Osaka for use  
2 in U.S. based litigation. It's pretty draconian.

3 THE COURT: Even if the deponent agrees?

4 MR. LODEN: That's my understanding.

5 MR. DAHILL: That's the way it's written, Your Honor.  
6 I will tell you similarly Mr. Loden and I had discussions, well  
7 let's do this either telephonically or let's do this by video  
8 conference. And there's actually a firm rule that says you  
9 cannot do it telephonically, and the ground rules for doing it  
10 by video conference which we still I want to try, require them  
11 having actually a counselor representative sitting in the room  
12 with the deponent. It is more difficult than we had  
13 anticipated, I would say that.

14 MR. LODEN: Absolutely.

15 MR. DAHILL: Your Honor, there may be a way to short  
16 circuit this whole process and especially the October 31st  
17 deadline. We did finally receive all of Lehman's formal  
18 jurisdictional discovery requests on Friday. We responded to  
19 those requests yesterday, less than one business day. The vast  
20 majority of those requests we stated, you've already got the  
21 documents, there are no further documents in our possession,  
22 custody or control. The only additional documents that might  
23 be produced relate to the six general jurisdictional requests  
24 for production which have been added to the mix, they weren't  
25 part of the mix that started in November. So depending on the

1 Court's ruling on those six, it may be that they've got, if the  
2 Court sustains our objections on those six, it may be that  
3 Lehman has all the documents now that they need and the  
4 deposition can happen much further than otherwise anticipated.  
5 But again, I think that depends upon the Court's determination  
6 on those six new requests for production.

7 I did receive apparently yesterday afternoon, Your  
8 Honor, the responses to our requests. Frankly haven't had a  
9 chance to review them to have a meet and confer on all the  
10 items, not the disputed items that counsel says, they've  
11 represented that they've produced everything we need to revisit  
12 that. So I'll be happy to look at that.

13 As regards, and I don't know if this is a good segue  
14 into the other documents.

15 THE COURT: Yes.

16 MR. DAHILL: The documents that are identified in my  
17 letter, Your Honor, which are codified also in the formal  
18 request, go to three basic topics -- contacts with the United  
19 States, who JA Hokkaido is. JA Hokkaido has presented itself  
20 as you know so Liberian farmers who operate in a very narrow  
21 area and frankly aren't aware of the bigger world. But the  
22 defendant here is an investment vehicle put together the  
23 purpose of which is to invest as best we can tell from  
24 documents already received internationally with strategies of  
25 where, how they weigh their portfolio, what exposure they take

1 in different countries. And from our perspective in responding  
2 to the papers that are right in the motion which has already  
3 been made, which points out everything that JA Hokkaido is not,  
4 all we're looking for is the opportunity to say what JA  
5 Hokkaido is.

6 The third item that's covered goes to the application  
7 jurisdictional basis of CPLR302A3 which one component of which  
8 is participation in international commerce. And to that end, I  
9 will cite to the Court in response to the pleadings submitted  
10 by Mr. Loden on Friday concerning the assertion that this only  
11 applies to manufacturers of goods and widgets or selling  
12 products. There's a case, Local 875 v. Pollack 992 F.Supp, 545  
13 (E.D.N.Y. 1998) case looking at CPLR302A3 and the defendant in  
14 that case was a Swiss investment management firm, and they were  
15 found to be covered by the statute because they engaged in  
16 investing activities around the world. So our view is that the  
17 application, that that provision is a potentially  
18 jurisdictional bases. And again, some of the discovery we're  
19 seeking in terms of what their portfolio is, where they, they  
20 conduct investments goes directly to that item. So we don't  
21 call them the general investment, we call them either specific  
22 U.S. contacts related to who JA Hokkaido is or to CPLR302A3.

23 THE COURT: Okay.

24 MR. DAHILL: Your Honor, if I may approach, can I  
25 hand up a copy of the responses that we filed yesterday. I

1 think it's necessary in order for you to look at the actual  
2 requests.

3 THE COURT: I think I have them, but let's make sure.  
4 Oh, no I don't have them.

5 MR. DAHILL: No, I didn't think you did, these just  
6 came across the wire yesterday.

7 THE COURT: This is going to be very difficult to do.

8 MR. LODEN: Well I just wanted to make a few points  
9 and thought it might be helpful. We're not going to go through  
10 the document in depth. But the requests at issue are numbers  
11 18, 19, 21, 22, 31 and 33.

12 THE COURT: All right.

13 MR. LODEN: For example, 18 says, the nature,  
14 documents sufficient to show the nature of all indirect  
15 investments in the United States. There's no definition for  
16 what that means or how that ties to any allegations in the  
17 complaint. Similar with number 19. Documents sufficient to  
18 show all the derivative investments. There's no explanation of  
19 how derivative investments is different from indirect or what  
20 it means or how it relates to anything in the complaint.  
21 Similar to number 21.

22 THE COURT: Well but they all, it's not that it  
23 relates to anything in the complaint, it's the question of  
24 whether or not JA Hokkaido has conducted business and/or made  
25 investments connected to or in the United States in a way

1 sufficient to establish personal jurisdiction. So in the  
2 extreme example, there's embedded in some mutual fund  
3 investment they've made five shares of Apple stock. Right? So  
4 what you're basically saying is well surely we don't have to  
5 tell them everything like that because that wouldn't be  
6 sufficient to allow them to assert jurisdiction over us.

7 MR. LODEN: Well we're certainly saying that. I  
8 don't know which request, is that a derivative investment,  
9 indirect or --

10 THE COURT: Here, we're getting --

11 MR. DAHILL: -- or any connection, which is number  
12 21, any connection with the United States.

13 MR. LODEN: Your Honor, these are requests that  
14 counsel deals with all the time. I mean some of the, the  
15 nature of the requests are clear, they go to the context. If  
16 counsel is having now definitional problems, I'm obviously  
17 happy to discuss those. Those aren't new, they've been --

18 THE COURT: Here's what we're going to do, here's  
19 what we're going to do. I've got a courtroom full of people  
20 and this is in effect a discovery conference that is more  
21 properly held off the record in chambers where we can go  
22 through the requests one by one and arrive at an understanding.  
23 So what I'm going to suggest to you is the following since  
24 you're here, is that you avail yourself of my conference room,  
25 let me conclude the rest of the hearing. To the extent that

1 you still have open issues, I will join you and we will get it  
2 done.

3 MR. DAHILL: Thank you.

4 THE COURT: With respect to the issue of whether or  
5 not there's going to be what I call a do over on the class  
6 certification, there's not. That's going to proceed, you can  
7 participate to the extent that you wish to participate. We can  
8 continue to talk about expediting this motion. Frankly I'm not  
9 sure how much will have been gotten done by November or  
10 December on the class certification front that it will be any  
11 real prejudice. And certainly to the extent that we can  
12 expedite this matter, including for example, once you have all  
13 the documents and I don't know if this runs afoul of Japan, of  
14 Japanese law, which I certainly don't want to do, is whether or  
15 not you could in lieu of a deposition propose some written  
16 interrogatories. So --

17 MR. LODEN: We would be amenable, and in fact we've  
18 offered that in the past.

19 THE COURT: I mean I'm not, they have the right to  
20 take a deposition, we have to do it consistent with local law,  
21 I'm just throwing it out there as yet another, you know,  
22 practical answer or suggestion to move it along more quickly.  
23 But I'm not going to impose that on you.

24 MR. LODEN: Thank you.

25 THE COURT: All right. So you know where my

1 conference room is.

2 MR. DAHILL: I do, Your Honor. Also, I'm not sure  
3 how [indiscernible] there were some letter requests.

4 THE COURT: Those are not on the calendar for today,  
5 and I'm not hearing them today.

6 MR. DAHILL: Okay. I would have only been here to  
7 oppose them, so thank you, Your Honor.

8 THE COURT: All right. What's next please?

9 MR. GOLDBERG: Your Honor, Lee Goldberg, Weil  
10 Gotschal and Manges for Lehman Brothers Holdings, Inc. and its  
11 affiliated chapter 11 estates. Your Honor, the next matter on  
12 the calendar is the omnibus application of individual members  
13 of the official committee of unsecured creditors and indenture  
14 trustees pursuant to section 1129(a)(4) or alternatively  
15 sections 503(b)(3)(d) and 503(b)(4) of the Bankruptcy Code for  
16 payments of fees and reimbursement of expenses. Your Honor,  
17 this is a status conference.

18 THE COURT: Okay.

19 MR. GOLDBERG: And I believe Ms. Coffino from  
20 Covington Burling is going to handle it.

21 THE COURT: All right. I don't know if you folks  
22 over here want to cede your places for the moment.

23 MR. GOLDBERG: Your Honor, if I may ask to be excused  
24 from the courtroom for the day. Thank you.

25 THE COURT: Yes, of course.

1 MR. GOLDBERG: Thank you.

2 THE COURT: All right. Good morning, Ms. Coffino,  
3 how are you?

4 MS. COFFINO: I'm fine.

5 THE COURT: Good to see you.

6 MS. COFFINO: Good to see you too.

7 THE COURT: All right. So, Ms. Schwartz, Ms. Golden,  
8 how are you today?

9 MS. SCHWARTZ: Good morning, Your Honor. For the  
10 record, Andrea Schwartz and Susan Golden for the United States  
11 Trustee.

12 THE COURT: Okay. Now my understanding is that there  
13 was a little activity and some correspondence yesterday. I did  
14 not review the correspondence, so you'll have to start from the  
15 very beginning. As far as I am aware, this is a scheduling  
16 conference post-remand from Judge Sullivan reversing that  
17 aspect of the plan that related to the entitlement of the  
18 individual committee members to their fees. So we're now back  
19 for scheduling conference on a hearing on substantial  
20 contribution.

21 MS. COFFINO: Good morning, Your Honor, for the  
22 record, Diane Coffino from Covington and Burling on behalf of  
23 Wilmington Trust Company, Your Honor, which is the co-chair of  
24 the creditors committee.

25 THE COURT: Okay. If you could speak up a bit, Ms.

1 Coffino.

2 MS. COFFINO: Sure. We are here on remand. Judge  
3 Sullivan sent this case back to this Court for a factual  
4 determination of whether the committee members have made a  
5 substantial contribution and can get their fees awarded under  
6 section 503(b)(3)(d). Originally we were going to propose a  
7 schedule that just put all the evidence in the declarations and  
8 a supplemental memo. But after one of our members spoke with  
9 the U.S. Trustee's office and learned that they have a view  
10 that there still is a threshold legal issue here as to whether  
11 committee members can ever get a substantial contribution award  
12 for committee service --

13 THE COURT: Hold it. Ms. Coffino is characterizing  
14 her position. You're going to have an opportunity to correct  
15 her or --

16 MS. GOLDEN: I appreciate that. But for the record  
17 Ms. Coffino is not the attorney or representing the law firm  
18 that even spoke to the U.S. Trustee.

19 MS. COFFINO: That's correct. I said one of the  
20 other members.

21 THE COURT: She said that. She said that. Let's  
22 everybody stay calm. Okay?

23 MS. GOLDEN: Sorry.

24 MS. COFFINO: You didn't read our letter, but we are  
25 proposing a column A, column B approach. We think Judge

1 Sullivan's decision forecloses this argument that he decided  
2 that they in fact, committee members, in fact may get  
3 substantial contribution awards so long as they can demonstrate  
4 that they did extraordinary work over and above normal  
5 committee duties.

6 THE COURT: The usual substantial contribution  
7 standard.

8 MS. COFFINO: Standard.

9 THE COURT: Okay.

10 MS. COFFINO: But if Your Honor were to disagree with  
11 us on the reading of that case and certainly the United States  
12 Trustee's office can state their own position on that, we  
13 thought if there was a threshold legal issue that needs to be  
14 resolved, we ought to resolve it first before putting in any  
15 declarations, so that we --

16 THE COURT: Okay. So there's that issue.

17 MS. COFFINO: Right.

18 THE COURT: But then there's also I need to hear from  
19 you your vision -- it's an evidentiary hearing. Correct?

20 MS. COFFINO: That's correct.

21 THE COURT: So I need to hear from you how you, what  
22 you think that ought to look like.

23 MS. COFFINO: Well we would precede that by putting  
24 in declarations of the witnesses and supplemental memorandum,  
25 the U.S. Trustee can respond to that and we thought we'd brief

1 it up front and then meet with you again as to the framework of  
2 an evidentiary hearing.

3 THE COURT: So the declarations would be in lieu of  
4 direct testimony at a trial?

5 MS. COFFINO: Yes, they could be, they could be.  
6 It's efficient that way, I know it gets done a lot in my other  
7 cases.

8 THE COURT: It does get done a lot. I guess I  
9 haven't given sufficient thought to how I'm going to be  
10 thinking about the issues, and my hesitation with the  
11 declarations, and we have to go back to threshold legal issue.  
12 But just food for thought, my hesitation with the declaration  
13 approach is that what I then get is a bunch of documents  
14 written by lawyers, that's what I get, instead of testimony,  
15 true testimony from a witness in their own words. So I have to  
16 balance the need for more from the horse's mouth testimony  
17 versus a bunch of declarations that are going to be written by  
18 lawyers. So I have to think about that.

19 MS. COFFINO: We'll do it any way you want, of  
20 course.

21 THE COURT: I'm sure you would say that. But I need  
22 to think about that. So let's hold that thought for the  
23 moment, and if you wouldn't mind, let me hear from Ms. Golden  
24 or Ms. Schwartz on the issue of the threshold legal issue.

25 MS. GOLDEN: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MS. GOLDEN: Again for the record, Susan Golden for  
3 the U.S. Trustee. Your Honor, first I'll discuss why the U.S.  
4 Trustee believes that the matter really should be more fully  
5 briefed, and then I'll discuss our difference of opinion and  
6 what the threshold issue is.

7 THE COURT: Well let's start simply.

8 MS. GOLDEN: Okay.

9 THE COURT: Do you believe that Judge Sullivan ruled  
10 that the committee members as a matter of law are not precluded  
11 from seeking 503(b) substantial contribution awards?

12 MS. GOLDEN: I think there's a subtlety to that. We  
13 believe that committee members as sitting on the creditors  
14 committee as committee members cannot seek a substantial  
15 contribution award, members of the committee who independently  
16 make a contribution to the case separate and apart from sitting  
17 on the committee. For example, I'll just give for  
18 hypothetical, Wilmington Trust, Wilmington Trust sat on the  
19 committee; we don't believe that Wilmington Trust by virtue of  
20 sitting on the committee and working super hard on the  
21 committee is allowed a substantial contribution claim. If  
22 Wilmington Trust did something separate and apart from sitting  
23 on the committee as an individual creditor in the case, we view  
24 that as a separate issue. So --

25 THE COURT: Well, let's read what Judge Sullivan had

1 to say. Okay?

2 MS. GOLDEN: Sure.

3 THE COURT: At the end of the decision Judge Sullivan  
4 said, accordingly, the Court holds that the Bankruptcy Code  
5 does not necessarily exclude official committee members from  
6 the benefits of 503(b) in all situations. Although official  
7 committee membership alone cannot be a sufficient condition for  
8 reimbursement of professional expenses, it is not a  
9 disqualification. As such, to the extent the individual  
10 members, which is defined, qualify under 503(b)(3)(d) by virtue  
11 of having made a substantial contribution to the bankruptcy  
12 case, they may have their professional fee expenses paid under  
13 503(b)(4). Nevertheless, the Court is no position to determine  
14 whether the individual members made such a substantial  
15 contribution and the Bankruptcy Court declined to reach this  
16 issue when it first presented. The Court therefore remands.

17 MS. GOLDEN: Well --

18 THE COURT: So I think it's pretty clear that Judge  
19 Sullivan said, take your shot, demonstrate that you made a  
20 substantial contribution and you can get your fees under  
21 503(b)(4). So I don't, I don't see a threshold legal issue.

22 MS. GOLDEN: Well, the other aspect of the threshold  
23 legal issue, and I think that this is a main thrust of our  
24 disagreement in terms of the briefing, is that it is my  
25 understanding that, on the application, would like to begin the

1 briefing with the above and beyond or extraordinary  
2 circumstances argument. We believe, as I think Your Honor just  
3 stated, that the threshold issue first is did they make a  
4 substantial contribution. And for that, they need to prove  
5 under 503(b)(3) whether the services benefitted a creditor or  
6 the estate itself or interested parties.

7 THE COURT: I have to say, Ms. Golden, I usually can  
8 follow every word you say, I do not know what you're trying to  
9 tell me.

10 MS. GOLDEN: Okay.

11 THE COURT: I simply do not, I'm not seeing, I'm not  
12 understanding the nuances.

13 MS. GOLDEN: Okay.

14 THE COURT: And let me just tell you where I am and  
15 maybe you can move me from that point.

16 MS. GOLDEN: Sure.

17 THE COURT: I read this decision, I read it when it  
18 came down, I read it, I've now read it four times, I read these  
19 paragraphs again last night. To me the only thing that's for  
20 me to decide is the evidentiary factual issue, did they make a  
21 substantial contribution as if --

22 MS. GOLDEN: That is where we are. Did they make a  
23 substantial contribution.

24 THE COURT: Okay. Then we have no dispute.

25 MS. GOLDEN: Under -- did they make a substantial

1 contribution under 503(b).

2 THE COURT: There's no legal issue to brief. So then  
3 there will be an evidentiary hearing as to whether each of them  
4 on an individual basis --

5 MS. GOLDEN: Yes.

6 THE COURT: -- made a substantial contribution.  
7 Right? And to the extent that there's a nuance because they're  
8 committee members as opposed to non-committee members, I  
9 suppose there will be an opportunity for you to say that,  
10 right, that there's a 50 page affidavit or there's five hours  
11 of testimony, and I guess you want to be able to make the  
12 argument that none of that was above and beyond the call of  
13 duty of a committee member, and therefore it doesn't qualify as  
14 a substantial contribution.

15 MS. GOLDEN: Correct.

16 THE COURT: Right? So that's not a threshold legal  
17 issue, that's whatever argument you're going to make after we  
18 have the trial. I can't re-rule on what Judge Sullivan ruled.

19 MS. GOLDEN: Absolutely, of course.

20 THE COURT: Right. So if I find, however, I find on  
21 the substantial contribution and folks want to appeal, I  
22 imagine that the U.S. Trustee would then be able to appeal  
23 Judge Sullivan's narrow ruling and take, and your office may  
24 want to take the position that in fact serving on a committee  
25 is a disqualification --

1 MS. GOLDEN: That is correct.

2 THE COURT: -- from getting substantial contribution.  
3 But that's not for me to weigh in on.

4 MS. GOLDEN: That is correct. But, you know, I  
5 agree, and we just want to make clear that what will be tried  
6 is in the first instance whether each of the applicants I'll  
7 call them, made a substantial contribution.

8 THE COURT: Right. But this is where we get into an  
9 interesting philosophical issue with your office.

10 MS. GOLDEN: You're not the first.

11 THE COURT: Ms. Schwartz is dramatically rolling her  
12 eyes, now shaking her head.

13 MS. GOLDEN: Ms. Schwartz, I'm shocked.

14 THE COURT: Pretending, feigning shock.

15 MS. GOLDEN: Yes.

16 THE COURT: And the interesting philosophical issue  
17 is, and I, despite the fact that it seems like I do this not  
18 infrequently, I'm not going to tell your office how to do its  
19 job. But one could make the observation that the U.S. Trustee  
20 took a legal position on this issue and it prevailed, not  
21 entirely, but partially, and we're back on a remand now.

22 MS. GOLDEN: Correct. We agree with that, yes.

23 THE COURT: Right. And now I should just do my job.

24 MS. GOLDEN: We agree with that too.

25 THE COURT: My job is to listen to all of them and to

1 convince me that they made a substantial contribution.

2 MS. GOLDEN: I agree with that as well.

3 THE COURT: And I'm not sure, and I understand you  
4 have standing as a party in interest to be heard in any issue  
5 in the case, I'm not sure what the views of the U.S. Trustee  
6 adds to that process. I am the finder of fact, there's a legal  
7 standard, I'm going to listen, I'm going to make a  
8 determination. So it's just unclear to me now that your office  
9 has clarified the legal issue or obtained the clarification of  
10 legal issue what more there is that I would really look to your  
11 office to provide. I'm the finder of fact, there's going to be  
12 a trial just like there is on anything else, and basically to  
13 me it almost boils down and you telling me that I'm going to  
14 make a clear error because that would be the standard. Right?  
15 I think if I find that they, any of them have made a  
16 substantial contribution and it goes up on appeal, that's a  
17 factual finding. And the standard on appeal is going to be  
18 clear error. So I think what you would be telling me now you  
19 would be saying if you find that they made a substantial  
20 contribution, basically you will committing clear error. So  
21 please, don't, this isn't personal.

22 MS. GOLDEN: Oh, I know that.

23 THE COURT: This is just, this is just me thinking  
24 about what the hearing is going to look like and how I'm going  
25 to think about what the U.S. Trustee will have to say. I see

1 Ms. Schwartz rising. You know, my usual rule, I have a no  
2 whack-a-mole rule, you know.

3 MS. SCHWARTZ: Right. However, Your Honor, I'm  
4 handling the litigation aspect of this. So if Your Honor would  
5 permit me to answer Your Honor's question on what more has to  
6 happen.

7 THE COURT: Okay.

8 MS. GOLDEN: That's fine.

9 MS. SCHWARTZ: We'll split it up, Your Honor.

10 MS. GOLDEN: We did split it up and Ms. Schwartz is  
11 handling the discovery and litigation aspect of this, so I will  
12 cede the podium to Ms. Schwartz for the moment.

13 THE COURT: All right. For those who may not have  
14 understood the reference, the no whack-a-mole rule is that I  
15 don't like to hear from multiple lawyers on behalf of one  
16 party. Okay. So Ms. Schwartz or Ms. Golden, are we now, and  
17 Ms. Coffino, are we in agreement that we're not going to have  
18 briefing on a threshold legal issue?

19 MS. SCHWARTZ: That is correct.

20 MS. COFFINO: Yes.

21 THE COURT: Okay, good.

22 MS. SCHWARTZ: Your Honor, so now getting to the  
23 point where Your Honor was asking the question what more is  
24 there to have done. And as part of those discussions, because  
25 as you know, our office as are many parties, we try to talk

1 about issues before we come before the Court to make as  
2 efficient and smooth hearing as possible. We spoke to Gene  
3 Darcy (phonetic) who is an attorney for one of the individual  
4 creditors who is not here today, and talked about some sort of  
5 a schedule, that this was a scheduling conference. And it's  
6 our view, and we thought only fair to the applicants that they  
7 have an opportunity to supplement any substantial contribution  
8 claim that they've made. If Your Honor may be aware, back in  
9 the day when this, when the 1129(a)(4) claim was made, there  
10 was in essence a very short section of that claim that said,  
11 and if we don't get it under that, we get it under 503(b). So  
12 we thought it fair that the applicants have an opportunity to  
13 supplement, replace, whatever they want to do as far as their  
14 claim is.

15 THE COURT: Okay.

16 MS. SCHWARTZ: They gave us a schedule of timeframe  
17 where they would have 120 days to file their claim. We had  
18 some, we don't care how much, we honestly don't care how much  
19 time that they need and the Court is willing to give them so  
20 long as we have the same amount of time.

21 THE COURT: Sure.

22 MS. SCHWARTZ: I will say, Your Honor, that of the  
23 basic issue on a substantial contribution claim including for  
24 example, that the services can't be duplicative, for example of  
25 what committee counsel did or they can't be only for the

1 interest of that individual creditor, but rather for the entire  
2 creditor body. Those are basic elements from Dana, Bayou  
3 (phonetic), Granite Partners, back in the day.

4 THE COURT: Right.

5 MS. SCHWARTZ: We have that set up. It may very well  
6 be and we think we will want to take discovery with respect to  
7 that. And the reason is is Your Honor may be aware that the  
8 committee had two sets, at least two sets of full time legal  
9 counsel, they had the Milbank law firm and they had the Quinn  
10 Emmanuel law firm. The Milbank law firm directed approximately  
11 and probably more than 400 attorneys to the work for the  
12 committee. That's not even including the Quinn Emmanuel people  
13 which we suspect is over 200. So there's a question as to  
14 whether or not the work that the individual members claim that  
15 they did over and above, extraordinary, etc. was in fact  
16 duplicative of the work that was being done by the 400 Milbank  
17 lawyers, etc.

18 Milbank's compensation in the case exceeds 235  
19 million, there was lots and lots of fees that were paid for  
20 this enormous amount of work. So we're likely going to want to  
21 take discovery of various parties to make a determination as to  
22 that. That doesn't go to whether Your Honor is going to make  
23 the call on whether they in fact made a substantial  
24 contribution. You are the trier of fact. But I think what  
25 Your Honor said, and I think that we should maybe not make the

1 decision on it at this moment as to whether or not the trial on  
2 the 503(b) claims is in fact on paper. It may be better, but  
3 of course, we're not going to dictate how the claimants decide  
4 to put their evidence in. But it may be better to have to give  
5 testimony. That's going to be your call, Your Honor, we'll go  
6 with whatever way Your Honor deems best. But issues such as  
7 duplication, self-interest and so forth --

8 THE COURT: So let's stop there. Okay.

9 MS. SCHWARTZ: Yes.

10 THE COURT: Because you just took it to, you know, we  
11 just hit warp speed in terms of what I was thinking about in  
12 terms of this.

13 MS. SCHWARTZ: Okay.

14 THE COURT: If what your office is thinking is that  
15 there's going to be a comparison of the claims that are made  
16 for substantial contribution against you know almost a half a  
17 billion dollars of timesheets, that can't possibly be the way  
18 this is going to go down. I'm telling you right now there is  
19 no way that I'm going to do that. There is no way that I'm  
20 going to do that.

21 MS. SCHWARTZ: Well --

22 THE COURT: So, and to go through, you know, three  
23 years, four years, of timesheets for \$400 million if you add  
24 Milbank and Quinn Emmanuel to ferret out things that are  
25 duplicative, I mean that's just a task that just doesn't make,

1 it's just not, with all due respect to your office, I just  
2 don't think it's a good idea.

3 MS. SCHWARTZ: Well, let me say this, Your Honor.

4 THE COURT: Or a wise use of resources. I am  
5 thinking of this much more in terms of a more global approach  
6 with a more global explanation of on the one hand we have  
7 hundreds of millions of dollars of fees incurred by hundreds  
8 and hundreds of lawyers, what did you do that was above and  
9 beyond what they did. Maybe I'm being very simplistic about  
10 it, but --

11 MS. GOLDEN: Your Honor, I have to say that I  
12 understand it could be a huge undertaking, it doesn't have to  
13 be, we haven't fully scoped all of it out. However, Your Honor  
14 is going to have to make a finding that what these individual  
15 creditors committees attorneys did was not duplicative of what  
16 the other attorneys were doing. That's part of a finding on a  
17 503(b) claim. We can't, and believe me, I'm going to be the  
18 one doing the work on this side, I understand what you're  
19 saying.

20 THE COURT: Right. But what I'm saying to you I  
21 guess is, what I'm saying is that --

22 MS. SCHWARTZ: But it can't be just a global thing,  
23 that oh well here's the recovery we got.

24 THE COURT: Right. But nor can it be that we bring  
25 in a truck to the back door with all the time sheets and we see

1 a line on a time billing report from some time in 2011 and it  
2 says work on plan issues and we say ah-ha, they were both  
3 working on plan issues, and therefore that's duplicative.

4 MS. SCHWARTZ: We're not contemplating that, Your  
5 Honor.

6 THE COURT: Okay.

7 MS. SCHWARTZ: However, the Court is going to have to  
8 make a factual finding on the basic element of a 503(b) claim,  
9 and in addition to that because these are individual members of  
10 a creditors committee who in fact are charged with the tasks  
11 that they did after Your Honor finds points, factors one, two,  
12 three and four, you will then get to and they will argue, we  
13 will argue, etc. whether or not they met that standard that  
14 Judge Sullivan mentioned in his decision. And so what we're  
15 trying --

16 THE COURT: I hear you. I hear you, I mean I guess  
17 we're just going to have to put our philosophical differences  
18 aside because I still don't really understand what's going to  
19 happen. The bid and the ask here is they get more money, and  
20 if they get more money the creditors get less money. Right?

21 MS. SCHWARTZ: Well they already got the money, we  
22 haven't talked about yet them safeguarding that money.

23 THE COURT: Okay. Let's not make it more  
24 complicated.

25 MS. SCHWARTZ: Okay.

1 THE COURT: Give me one moment while our visitors are  
2 going to go visit with Judge Gropper. Thank you so much.

3 UNIDENTIFIED: Thanks, Judge.

4 THE COURT: Enjoy the rest of your visit.

5 UNIDENTIFIED: Thanks so much. You'll be seeing more  
6 of three of them for the week.

7 THE COURT: Okay, very good. Bye-bye. Thank you.  
8 It's hard enough to understand in English, let alone through an  
9 interpreter. So you know --

10 MS. SCHWARTZ: May I make a suggestion here, Your  
11 Honor?

12 THE COURT: Yes.

13 MS. SCHWARTZ: I mean as I said, it was our  
14 understanding that this was going to be a scheduling  
15 conference. And I think that we should have some time to talk,  
16 the parties talk together.

17 THE COURT: Okay.

18 MS. SCHWARTZ: Let us try to work out a schedule, let  
19 us try to work out a scope of discovery, let us try to do that.

20 THE COURT: That's a good suggestion.

21 MS. SCHWARTZ: We have all reasonable people. I mean  
22 everybody has been living this issue for a long time, and I  
23 think that that, and let us try to present that to Your Honor.  
24 And if we can't do that, then we'll come to Court for help.

25 THE COURT: But we now have clarity that there's not

1 going to be any briefing on a threshold legal issue.

2 MS. SCHWARTZ: Right.

3 THE COURT: We're going to go right to the main  
4 event.

5 MS. SCHWARTZ: Right.

6 THE COURT: Okay. So then at least we accomplished  
7 something today.

8 MS. SCHWARTZ: Okay.

9 THE COURT: All right. So let me hear from Ms.  
10 Coffino again. Thank you Ms. Schwartz. That was very helpful  
11 for me to understand where you're coming from.

12 MS. SCHWARTZ: Thank you.

13 MS. COFFINO: I'd like to know more about the scope  
14 of this discovery. I don't think from the members perspective,  
15 we don't see a need for massive discovery here and we share  
16 your concern. We don't want to be here in three years having a  
17 trial, you know, in 2017.

18 THE COURT: Well, but Ms. Schwartz just said that you  
19 know the next thing is that you guys should talk and figure it  
20 out.

21 MS. COFFINO: Right.

22 THE COURT: And if you can't agree you'll let me know  
23 and you'll come back in on a more traditional, you know,  
24 discovery conference, you'll have a meet and confer, etc. I  
25 think I'd like to think about, I think written submissions

1 would be helpful, and what I would say to you is that you  
2 should proceed assuming that at least in the first instance  
3 there will be written direct submissions, but that I'm going to  
4 reserve my right to ask in addition that there be live  
5 testimony. Certainly if somebody believes the right to cross-  
6 examine a declarant, but I may also ask that there be  
7 additional direct testimony in addition to what's written in  
8 the declaration. Okay. So that way you --

9 MS. COFFINO: Okay. We don't, we have no objection  
10 to proceeding to a meet and confer to flush out these issues.

11 THE COURT: Okay. So then why don't you do that and  
12 then reach out to Ms. Lutkis and we'll put you back on the  
13 calendar. It doesn't have to be on a Lehman day, if you need  
14 to come in for a discovery and a further scheduling conference,  
15 we can see you individually.

16 MS. COFFINO: Okay, thank you very much.

17 THE COURT: And you know I like to see people in  
18 person but it's a large group, so if we can help keep expenses  
19 down by having some people phone in we can think about that  
20 too.

21 MS. COFFINO: Okay.

22 THE COURT: Ms. Golden?

23 MS. GOLDEN: Sure, Your Honor. Just one thing. The  
24 U.S. Trustee doesn't have any objection to one of the firms,  
25 obviously there are several firms here that are implicated.

1 THE COURT: Right.

2 MS. GOLDEN: One firm taking the lead in terms of  
3 speaking in Court in terms of the legal issues and whatnot.  
4 And as Your Honor had said that each individual creditor has to  
5 make their case before you, but we just want to let Your Honor  
6 and all the parties here know that we do not have any issue  
7 with Ms. Coffino or anyone, you know, taking the lead as one  
8 attorney and all of them signing on to a legal brief as opposed  
9 to Your Honor having to hear the same thing fifteen times.

10 THE COURT: That would be delightful. All right.  
11 Very good. This was very helpful and productive. Thank you  
12 all for coming in. You may be all excused obviously.

13 MS. COFFINO: Thank you.

14 THE COURT: Ms. Schwartz?

15 MS. SCHWARTZ: Yes, Your Honor.

16 THE COURT: If I could impose on you to stop by my  
17 chambers, you stepped up on a matter the other day involving a  
18 pro se litigant.

19 MS. SCHWARTZ: Right.

20 THE COURT: And there was a subsequent development.

21 MS. SCHWARTZ: Okay.

22 THE COURT: And if you would stop by my chambers and  
23 talk to Ms. Isen, I think there's something that your office  
24 should be aware of.

25 MS. SCHWARTZ: Thank you, Your Honor.

1 THE COURT: Okay. Thank you. Okay. What's next?

2 MR. MARGOLIN: Good morning, Your Honor, Jeffrey  
3 Margolin, Hughes Hubbard and Reed for Mr. Giddons, the trustee  
4 of Lehman Brothers Inc. We have one matter on the LBI portion  
5 of the calendar this morning that's going to be handled by my  
6 colleague, Amina Hassan.

7 THE COURT: Okay.

8 MS. HASSAN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MS. HASSAN: Amina Hassan from Hughes Hubbard and Reed  
11 for the trustee. I'm going to be addressing the one contested  
12 matter at issue here, which is the trustee's objection to a  
13 claim filed by Mr. and Mrs. Gale. It's a general creditor  
14 claim for approximately 2.5 million in alleged damages related  
15 to one of the accounts that the Gales maintained at LBI from  
16 2000 to 2008.

17 The trustee has briefed his position in the papers,  
18 so I will just be hitting on some of what we consider to be the  
19 key issues which underlie our positions, i.e., that this claim  
20 should be expunged in its entirety and with prejudice. What we  
21 have here, Your Honor, is claimants who are basically seeking  
22 or requesting the Court to go back in time and be able to redo  
23 their investments and redo their decision not to bring this  
24 claim earlier. It is very unfortunate that they suffered  
25 losses in their account. However, their claims can just not be

1 sustained. The bulk of the claim is Steingard (phonetic) and  
2 what remains all relates to creating that what was ratified by  
3 the Gales over the years that they maintained their account at  
4 LBI.

5 As Your Honor knows through the pleadings, the Gales  
6 opened their account in 2000 with LBI. The account is  
7 primarily invested in technology stock, household names such as  
8 AOL, Cisco, so on and so forth. Unfortunately, the account  
9 suffered losses soon thereafter. I think it's significant to  
10 know that approximately 85 to 90 percent of the total  
11 diminution in value of the account actually happened between  
12 June 2000 when the account was opened and July 2002, and the  
13 two things notable about those losses. One, as the court will  
14 note, those losses coincide with the technology market crash.  
15 And number two, all of those losses are prior to the statute of  
16 limitations bar.

17 As we understand, the claimants filed their statement  
18 of facts with FINRA in July of 2008. They've alleged a number  
19 of causes of action, but the maximum time limitation applicable  
20 to any of them is six years which would mean that the cutoff  
21 for limitations period is July 2002 or July 2nd, 2002. And it  
22 is our position that any of their losses or any claim related  
23 to the period prior to that is Steingard and should be expunged  
24 and disallowed for at least that reason.

25 Moving on --

1 THE COURT: So the beginning account value, I'm  
2 basing this off of some of the account statements, looks like  
3 the beginning account value in June of 2000 was somewhere north  
4 of two million two.

5 MS. HASSAN: That's correct.

6 THE COURT: And then the July 2002 beginning account  
7 value is \$657,000.

8 MS. HASSAN: That sounds correct, Your Honor.

9 THE COURT: And what is just for my own, remind me,  
10 what's considered the turnover rate or the commission to equity  
11 ratio above which its considered to be churning, do you know?

12 MS. HASSAN: Yes, Your Honor, I believe it's a  
13 turnover ratio which is generally used as a benchmark as a  
14 turnover ratio of six. But based on the expert analysis that  
15 has been provided by claimants here, the average turnover is  
16 actually half of that, and at no point during those eight years  
17 does it actually get to six or over that. And for that reason,  
18 we believe that at least the churning allegation it can't even,  
19 because it can't meet that benchmark, it cannot be sustained.

20 THE COURT: So in a year, and this is really just for  
21 my own understanding, so I'm looking at turnover and cost ratio  
22 summary that's attached to the trustee's reply, and for example  
23 --

24 MS. HASSAN: Your Honor, do you mind telling me which  
25 page you're on so I can look at the same thing?

1 THE COURT: It's page 21, it's in a bracket, the  
2 numbers are in a bracket, I just happen to be turning to page  
3 21. Do you see that one?

4 MS. HASSAN: Yes, I do.

5 THE COURT: Okay. So for example, in 2006, the total  
6 purchases and the total sales are nearly identical. Right?  
7 There are \$2.9 million in purchases and \$2.9 million in sales.  
8 And the portfolio turnover ratio is just four.

9 MS. HASSAN: Correct.

10 THE COURT: So I don't -- so that's not considered  
11 churning, in other words in a number, the entire account turned  
12 over, that's not, under the legal standard of churning, that's  
13 not churning?

14 MS. HASSAN: That's right, Your Honor, because one,  
15 it doesn't meet that particular benchmark and I also believe  
16 it's not just a matter of the entire account or the activity in  
17 the account, it's more, you know, whether specific, let's say  
18 you're buying the same securities, you're selling the same  
19 securities, that would be more symptomatic of churning I  
20 believe than just the whole account, there being activity in  
21 the account.

22 THE COURT: I see. Okay, I understand what you're  
23 saying. All right. And, all right, is there anything else you  
24 wanted to add before we hear from the counsel for the Gales?

25 MS. HASSAN: I will just quickly add, so once we have

1 the statute of limitations, a bulk of the claim basically set  
2 aside under the statute of limitations from our point of view,  
3 what's left is the six year period, 2002 to 2008, and we know  
4 from the pleadings submitted by the claimants that they were  
5 receiving monthly statements which told them exactly what was  
6 happening in their accounts. They were also on notice under  
7 their agreement that they signed with LBI and under the  
8 statements that they were receiving that if they have an  
9 objection to make to any of the statements or to any of the  
10 trades, they need to speak up and they need to put it in  
11 writing within ten days. But what we see is we didn't have any  
12 of those objections during the six years. In fact, Mr. and  
13 Mrs. Gale chose to continue maintaining their account at LBI,  
14 they continued depositing money, withdrawing money, and all  
15 those actions signify ratification of consent to how their  
16 account was being handled.

17 And for those reasons, Your Honor, I think between  
18 the statute of limitations argument and the ratification  
19 argument we believe that those two particularly are dispositive  
20 of the claim in its entirety.

21 THE COURT: All right. Thank you. Good morning.

22 MR. MEISSNER: Good morning, Your Honor.

23 THE COURT: Go ahead.

24 MR. MEISSNER: Yes, I represent the Gales which  
25 contrary to many of the parties that are before you, they're

1 not the Bank of New York, they're not the Bank of America.

2 THE COURT: I understand.

3 MR. MEISSNER: They're not 133 employees of Lehman  
4 Brothers, they're just two individuals. I think the first  
5 issue is what I would call in my experience as a prosecutor,  
6 former prosecutor, a bait and switch that went on here.  
7 Procedurally.

8 THE COURT: Let me go right there. I don't think  
9 there was a procedural bait and switch, okay. I think what  
10 happened is for whatever reason on or around August 11th, you,  
11 it occurred to you that one of the things that you might do  
12 would be to move to lift the stay to compel arbitration. And  
13 the fact that you did not determine to do that before is not  
14 the trustee's fault. The trustee did not keep that thought out  
15 of your mind. So nothing that was said in the papers in that  
16 regard is a bait and switch. I mean that, you were never told  
17 not to do that, you just didn't do it.

18 MR. MEISSNER: Respectfully, Your Honor, the history  
19 started with the filing of the notice of objection.

20 THE COURT: Right.

21 MR. MEISSNER: And I'm looking at it right here. It  
22 says the claim should be disallowed for the following reasons.  
23 It's very simple, it's two pages.

24 THE COURT: Right.

25 MR. MEISSNER: And it made numerous references to the

1 statement of claim which factually did not have the references  
2 in it, it attached exhibits that they claim stood for things  
3 that it didn't stand for, and I'm looking at it, it says the  
4 claim should be disallowed for the following reasons --  
5 ratification, lack of loss causation.

6 THE COURT: Right. And statute of limitations.

7 MR. MEISSNER: And statute of limitations, period,  
8 nothing about pleadings or anything else.

9 THE COURT: But you're taking, you're turning the  
10 world on its head. Those are the three grounds, those are  
11 still the three grounds.

12 MR. MEISSNER: Well no, I'm looking at the reply  
13 which attaches numerous exhibits that weren't attached to the  
14 original objection.

15 THE COURT: Okay, I don't need to look at --

16 MR. MEISSNER: And the first very long argument is  
17 the claim fails to correctly plead a cause of action, and it  
18 goes on for several pages. That was not addressed, we didn't  
19 have a right to respond to that.

20 THE COURT: But that has nothing to do with an  
21 eleventh hour argument that after we've gone through all of  
22 this that we're now going to stop in our tracks so that you can  
23 make a motion to compel FINRA arbitration, it has nothing to do  
24 with that.

25 MR. MEISSNER: Their first argument was in an

1 affidavit by the trustee was that we didn't even file a FINRA  
2 arbitration.

3 THE COURT: They made a mistake.

4 MR. MEISSNER: Right. So we responded based on the  
5 paperwork that was provided, now they're making an issue that  
6 hey we want you to comply with the pleading requirements in  
7 federal court which obviously would not be part of what's  
8 required in FINRA arbitration. And now in response to that new  
9 argument, new argument, we said fine, if you want us to deal,  
10 make that argument --

11 THE COURT: No, no, no. That's not what they're --  
12 you're twisting every bit of this. They're not saying that  
13 we're going to impose a FINRA pleading standard such as they  
14 are on this proceeding. We're now in a federal --

15 MR. MEISSNER: Court. Court pleading.

16 THE COURT: Pardon?

17 MR. MEISSNER: Opposing the court pleading, the  
18 opposite.

19 THE COURT: No, no, no.

20 MR. MEISSNER: They're saying that we want to impose  
21 the federal pleading requirements.

22 THE COURT: That's right. We're in a federal court,  
23 and the Federal Rules of Civil Procedure apply. So  
24 accordingly, they have the right to say, look, all we know you  
25 submitted a proof of claim, a proof of claim can be two

1 sentences, right, and a debtor or a trustee can then say I  
2 object to the claim because I don't know what the claimant is  
3 talking about. And then the court can say, you know, what,  
4 you're right, claimant, you need to file a claim with more  
5 precision. In the Lehman case, we have this structure in which  
6 we basically have kind of a 12(b)(6), this is kind of a  
7 12(b)(6), it's a sufficiency hearing. Okay. So we have,  
8 they've said on the merits, they have ratification, lack of  
9 loss causation and statute of limitations. And all that  
10 they've said at the next round is, look, if you're not inclined  
11 to dismiss it entirely out of hand, they at least, they, your  
12 clients, at least ought to file a claim that complies with rule  
13 9(b) because you are in some instances alleging things that  
14 sound like fraud. That's all.

15 MR. MEISSNER: Right. But their reply they attach  
16 the actual contract that our client agreed --

17 THE COURT: So what?

18 MR. MEISSNER: -- and forced into arbitration.

19 THE COURT: But you've known about that contract all  
20 this time.

21 MR. MEISSNER: We didn't have the contract.

22 THE COURT: That's not their fault. You have --

23 MR. MEISSNER: No, it is their fault, it's their  
24 contract filled out by them, given to them. We don't have it.

25 THE COURT: Your clients didn't have it?

1 MR. MEISSNER: No.

2 THE COURT: I'm sorry --

3 MR. MEISSNER: It's their own contract, they forced  
4 the clients to sign and they keep.

5 THE COURT: Oh no, no, no, no, we're not going to  
6 play that game. You have clients, you have clients who gave,  
7 who now seek to enforce a contract. This wasn't a secret  
8 agreement that Lehman had. Your client signed it.

9 MR. MEISSNER: I understand that. It's among --

10 THE COURT: Your clients made a FINRA claim.

11 MR. MEISSNER: Right, exactly.

12 THE COURT: Right. And now at the eleventh hour  
13 you've decided, oh great, let's go to FINRA. But --

14 MR. MEISSNER: I don't think it's the eleventh hour,  
15 but --

16 THE COURT: It's the twelfth hour.

17 MR. MEISSNER: Well --

18 THE COURT: You know --

19 MR. MEISSNER: The trustee incorrectly claimed that  
20 we didn't even file a FINRA.

21 THE COURT: They made a mistake.

22 MR. MEISSNER: We addressed that issue specifically --

23 THE COURT: That's right. Okay. So now we have that  
24 fact, there was a FINRA complaint that was filed in July of  
25 2008. Correct? Right?

1 MR. MEISSNER: Right.

2 THE COURT: No dispute about that. Okay. You only  
3 get to go back six years. You only get to go back to six  
4 years?

5 MR. MEISSNER: Go back to where? Yeah, well I'll  
6 address the substance of that if you'd like, I'd be happy to do  
7 that.

8 THE COURT: Under what possible scenario can you go  
9 back more than six years?

10 MR. MEISSNER: Well first of all, there's a  
11 mischaracterization of the applicability of statute of  
12 limitations. If one took the time to read the actual statement  
13 of claim, it's clear that our claim is not based on what they  
14 are doing out of pocket damages, it's based on market damages,  
15 and it was supported by Miley (phonetic) and other case law  
16 marketed just to damages. If you just read the complaint --

17 THE COURT: No, no, no, no, no. You are three steps  
18 ahead. The Gales gave their money to Lehman in the year 2000.  
19 Right?

20 MR. MEISSNER: Well first of all, the losses that we  
21 claim, if you want to look at the market analysis provided, the  
22 losses that we claim if you want to start at 2002 forward is  
23 over \$750,000. That's the losses from 2002 forward. That's --  
24 secondly --

25 THE COURT: Mr. Meissner, you're really, I don't know

1 whether it's purposeful or not, but you're not sticking with me  
2 here on the points that I'm making. The Gales gave Lehman \$2.2  
3 million in the year 2000.

4 MR. MEISSNER: Right.

5 THE COURT: By July of 2002 which is six years back  
6 from when the FINRA claim was filed, the account had dwindled  
7 to \$650,000. During the period of time prior to that, the  
8 Gales were entirely aware, indeed, and complained about what  
9 was happening to the value of their investments.

10 MR. MEISSNER: And they were misled by their broker  
11 as detailed in the claim and therefore that raised an issue of  
12 fraudulent concealment and equitable estoppel.

13 THE COURT: There was no fraudulent concealment.  
14 They had the account statements, they complained about what  
15 happened, they had the ability at that time to do something  
16 about it and they did not.

17 MR. MEISSNER: Your Honor, if that was the case then  
18 there would be no need for FINRA at all because every -- I've  
19 been doing this for over a decade, every --

20 THE COURT: Let me tell you something Mr. Meissner,  
21 okay, my number one least favorite thing is when people tell me  
22 how long they've been doing that, because that's their way of  
23 telling me that I don't know what I'm doing. So I've been  
24 doing this for a really long time too.

25 MR. MEISSNER: I don't claim to be a bankruptcy

1 expert, I'm a FINRA arbitration attorney, I represent both --

2 THE COURT: That's great, you're in a bankruptcy  
3 court now.

4 MR. MEISSNER: Both sides.

5 THE COURT: Okay. You're in a bankruptcy court in  
6 which we apply statute of limitation.

7 MR. MEISSNER: But we're dealing with a unique FINRA,  
8 violation of FINRA rules and investments issues. And as Your  
9 Honor knows from the case law, the case law cited is going back  
10 to the 80s and 90s because almost all cases go to FINRA  
11 arbitration, so there's very little updated case law to apply,  
12 that's why people apply to the SEC enforcement actions in FINRA  
13 arbitration. The --

14 THE COURT: There's a motion before me now on a  
15 sufficiency hearing under the procedures that have been in  
16 place in this case for years. The three basis for striking the  
17 claim are ratification, lack of loss causation and the statute  
18 of limitations. There's nothing that you've said that  
19 persuades me that the Gales are entitled to assert a claim  
20 against this estate based on anything that occurred prior to  
21 six years prior to the filing of the FINRA complaint.

22 MR. MEISSNER: Well, Your Honor, the claim, and I  
23 could if you want me to, cite the quote from the claim is  
24 detailed with regard to representations made by the broker that  
25 caused them to not be able to file their claim. This is not,

1 this is in essence a suitability case. If people --

2 THE COURT: What is it that the broker did, remember  
3 now, we're talking about the statute of limitations, the way  
4 that you extend the statute of limitations in general terms are  
5 showing facts and circumstances that rendered you incapable of  
6 knowing that you had a claim. The Gales month after month got  
7 their statements that showed the decline in their account which  
8 if they were reading the newspaper, they would see that  
9 everybody's accounts were declining.

10 MR. MEISSNER: But that's not true, Your Honor. The  
11 entire claim shows that that's not what was happening. In  
12 fact, the base of the claim says that the --

13 THE COURT: Are you denying that the Gales were aware  
14 that their account went down from \$2.2 million --

15 MR. MEISSNER: No. No.

16 THE COURT: -- to \$600,000?

17 MR. MEISSNER: No, but --

18 THE COURT: And they complained to Lehman, didn't  
19 they?

20 MR. MEISSNER: Yes, they complained about losses, but  
21 as Your Honor knows, losses does not mean you have a claim.  
22 And in fact it was only as a result of an analysis which  
23 compared the standard deviation of the Standard and Poor's 500  
24 compared to how the Gales were invested, for example.

25 THE COURT: But there's no -- that's not the way a

1 statute of limitations works. There was nothing that prevented  
2 them from taking action.

3 MR. MEISSNER: They didn't know they had a claim. Of  
4 course, as Your Honor, the very assertion that the idea that --

5 THE COURT: Here's the difference.

6 MR. MEISSNER: -- the market in general was going  
7 down, so you don't have a claim. And that's what was portrayed  
8 by the broker which was false, and if we give them the  
9 opportunity would be able to show that. The reality is if the,  
10 we gave the details of our damage analysis is a 60/40  
11 diversity. If the same money was invested 60 percent in  
12 diversified equities and 40 percent bonds, they would have made  
13 \$700,000, not lost two and a half million.

14 THE COURT: That's --

15 MR. MEISSNER: That shows there wasn't a market-wide  
16 collapse.

17 THE COURT: They were aware, they got monthly  
18 statements showing how their monies were being managed and they  
19 elected not to do anything.

20 MR. MEISSNER: But you're talking about ratification  
21 defense, and if that applied, then there would be no ability to  
22 have any suitability case anywhere because the essence of  
23 suitability is that based on the person's lack of experience in  
24 investing and otherwise, they rely on the broker. The reality  
25 is, everyone gets statements, unless you're dealing with a

1 [indiscernible] everyone gets statements. So if everyone that  
2 gets statements means that they can't file a suitability case -  
3 -

4 THE COURT: So in your world, in your world, there's  
5 no statute of limitations ever until you for some reason you  
6 think that those losses are really too severe, I think I'll go  
7 out and hire an expert, and then when the expert tells you you  
8 have a claim, that's when your claim kicks in. That's like  
9 saying that somebody gets in a car accident, they get hurt and  
10 they wait ten years and some relative of theirs says, oh you  
11 know you could have filed a claim because you got hurt in a car  
12 accident. That's not --

13 MR. MEISSNER: No, I'm not saying that.

14 THE COURT: The purpose of a statute of limitations  
15 is that when you have, when you know what you know you then  
16 have to act on it.

17 MR. MEISSNER: I'm reading from page 8, McDonohue  
18 explained, that is the broker, McDonohue explained that the  
19 losses were simply reflective of the market conditions and that  
20 he was investing the same investments that they were invested  
21 in notably failing to distinguish between the clearly different  
22 suitability requirements if such were in fact true. He  
23 sympathized with the Gales reassuring that he and his wife were  
24 suffering from the same market and he stated that he almost had  
25 lost his vacation home, and I can go on and on. There are

1 numerous representations in this statement of claim and no, the  
2 answer is no, not everyone. It depends on what if any  
3 representations are made by that broker, what the relationship  
4 is between the broker and the client and the background  
5 experience of the clients. That plays a role and every case is  
6 different with respect to whether there is any ratification and  
7 the trigger for statute of limitations.

8 Secondly, I have to say, as we've made clear over and  
9 over again, our claim for damages is not what you're referring  
10 to and what the trustee self-servingly referred to as out of  
11 pocket losses, it's market adjusted damages.

12 THE COURT: Believe it or not, I understand what  
13 you're talking about.

14 MR. MEISSNER: So then --

15 THE COURT: And my point is that the starting point  
16 which you don't agree with me is you're saying that we should  
17 go back to the beginning and run an analysis of what the Gales  
18 would have made had they been invested 60/40 or whatever you  
19 say it should have been.

20 MR. MEISSNER: Well I think Judge Ward in the  
21 Meridian decision laid out the fact you know that this is the,  
22 the facts here are the poster child of equitable estoppel and  
23 fraudulent concealment. The defendant should not benefit by  
24 their broker continuously misleading the clients into thinking  
25 that --

1 THE COURT: So let me ask you this, let me ask you  
2 this question. If the broker engaged in this conduct, then why  
3 is LBI responsible unless you can show that LBI was complicit.  
4 The broker --

5 MR. MEISSNER: Respondeat superior -- he's an agent  
6 of --

7 THE COURT: Under respondeat superior, the employer  
8 is not responsible for the criminal conduct or the fraudulent  
9 conduct of the employee unless they had knowledge or were  
10 complicit.

11 MR. MEISSNER: No, I think it's within the scope of  
12 his employment, it's not criminal, we're not saying criminal.

13 THE COURT: It is not within the scope of someone's  
14 employment to churn or engage in fraudulent conduct. That is  
15 not within the scope of someone's employment.

16 MR. MEISSNER: A broker who makes recommendations and  
17 advises in this case took complete discretion of the account,  
18 that's all within their purview of acting. If the idea is that  
19 if you know someone does something that they're not supposed to  
20 and causes damages to someone, that their employer is never  
21 responsible, I don't think that's the standard. Obviously if  
22 you went out and broke their car window, that's a different  
23 story, but we're talking about a broker who was perceived,  
24 giving the perception of doing what he's supposed to be doing  
25 and working for Lehman Brothers, and in fact did not comply

1 with numerous FINRA and SEC rules. So it's right, it's  
2 certainly right on target with 90 percent of the claims that I  
3 file every day in FINRA, the broker does something, you know  
4 you don't even name the broker, you name the company. That's  
5 who is responsible, and you know, I don't see arguments that  
6 we're not responsible unless it's something that's like a  
7 Madoff situation possibly, but that's not this.

8 THE COURT: And there's, and you in your view the  
9 plaintiff controls the running of the statute of limitations by  
10 their decision when to retain an expert to explain to them that  
11 the numbers that they saw on a piece of paper about which they  
12 complained in fact give them a cause of action.

13 MR. MEISSNER: It's not --

14 THE COURT: That cannot be the law.

15 MR. MEISSNER: -- just the client and it's not you  
16 know, heads I win, tails you lose, in other words if they  
17 didn't complain, we cite, hey they never complained, and if  
18 they do complain then they should have known and it's basically  
19 you can't win. The reality is they did complain and it's  
20 detailed in the --

21 THE COURT: They did complain. They did complain.  
22 They didn't get anything back, they complained, they didn't get  
23 anything back.

24 MR. MEISSNER: No, they didn't complain in asking for  
25 money back, they complained and the broker pacified them and

1 misled them and lied to them.

2 THE COURT: At the time, in real time they complained  
3 to Lehman Brothers about the losses in their account.

4 MR. MEISSNER: And that was mishandled because that  
5 was referred right back to the broker.

6 THE COURT: And at that point in time they had the  
7 ability to say just like we all do when we don't get a  
8 satisfactory answer from customer service, I'm taking, I'm  
9 ending my account, I'm moving, I'm suing you, and they elected  
10 not to do that.

11 MR. MEISSNER: Based on misrepresentations just like  
12 in the fraudulent concealment and equitable estoppel referred  
13 to in the Meridian case. I mean the defendants should not  
14 benefit by misleading the clients. And it's not like this is  
15 not detailed in the claim, it is detailed in the claim.

16 THE COURT: Well let me hear from LBI again. And  
17 we're going to have to agree to disagree about the  
18 responsibility of the broker for the fraudulent conduct of an  
19 employee in the absence of showing that the employer had  
20 knowledge or was otherwise complicit with the conduct of the  
21 employee.

22 MR. MEISSNER: Supposed to be supervised by this  
23 supervisory --

24 THE COURT: I understand, you know, I understand  
25 about adequate supervision, I get all of that. So what have

1 you heard that persuades you that this claim ought to survive?

2 MS. HASSAN: Nothing, You Honor. We have --

3 THE COURT: What about the fact that the broker  
4 actively misled the Gales about that everything was honky dory  
5 in their account.

6 MS. HASSAN: With the misrepresentation, respectfully  
7 let me point out Mr. Meissner talked about what the Gales are  
8 not, but I think we also have to admit to the fact that they  
9 are relatively sophisticated investors, we're talking about  
10 Mrs. Gale who is a lawyer, a GC of a communications firm, we  
11 know from the pleadings themselves that she had been investing  
12 in the market since at least early 1990s. So that's one. And  
13 regardless of that sophistication, one, I still don't follow  
14 what the misrepresentation is. What we know in the statement  
15 of facts what we have is that the broker told Mr. and Mrs. Gale  
16 that there are market wide losses. Now I'm not sure whether  
17 anyone can say that's a misrepresentation, but that's a  
18 representation.

19 THE COURT: Well I think what Mr. Meissner is getting  
20 at is the Gales through, and Mr. Meissner you can correct me if  
21 I get this wrong, that the Gales thought they would have been  
22 invested in a more diversified portfolio, 60/40 or what have  
23 you that would have given them a buffer against the precipitous  
24 decline in tech stocks. That's not how they were invested. So  
25 but that gets us into a problematic cul-de-sac because to your

1 point, the Gales could read the statements and see that they  
2 were all in tech, that it wasn't 60 tech and 40 money bonds or  
3 some other you know fixed or more secured investments. So  
4 that's kind of a problem.

5 MS. HASSAN: The basic idea, Your Honor, basically is  
6 they knew everything or they had everything, nothing changed  
7 between February of 2008 when they decided to retain an expert  
8 and [indiscernible] in 2002. They still had the same account  
9 statements which tell them exactly what is happening in their  
10 account. If they wanted to retain an expert at that point,  
11 they could have done that, they could also have read the  
12 account statements to see, you know, this is tech stock, this  
13 is not bonds for instance. And that's our point. All LBI saw  
14 for the six years --

15 THE COURT: I mean this is not Madoff in the sense of  
16 the statements were not made up, the statements actually  
17 reflected what their investments were. That's when the statute  
18 of limitations truly would not run when you're given a piece of  
19 paper that says here's your portfolio and Mr. Meissner, you  
20 said a boiler room, I don't exactly know what that means, but  
21 it's a fake, that's not really your account, there's no  
22 allegation of that here.

23 MR. MEISSNER: Right.

24 THE COURT: Right?

25 MR. MEISSNER: Correct.

1 THE COURT: Okay. At least I got one right.

2 MS. HASSAN: And we agree with the Court that you  
3 know, with the statute of limitations, there is a due diligence  
4 burden or requirement on the claimants as well. They had all  
5 the information, they didn't take action before the running of  
6 the limitations period, and as far as we can see they didn't  
7 take any action in the six years that followed. And for those  
8 reasons, the limitations and the ratification are the consent  
9 to how the account has been handled by the remaining six years,  
10 we don't see a reason why this claim should not be expunged.

11 THE COURT: All right. Here's what I'm going to say.

12 MR. MEISSNER: If I could just make one more point.

13 THE COURT: Sure.

14 MR. MEISSNER: Your Honor, as Your Honor pointed out  
15 in the questioning before I started, this account was not a buy  
16 and hold account, this account was turned over five times, 500  
17 times, that means you imagine what was going on in these  
18 statements. There was thousands of trades and to expect  
19 someone who is not an expert or financial advisor to read  
20 through that, and hey this is what's going on.

21 THE COURT: No, no. Okay.

22 MR. MEISSNER: Even I, when I get a claim like this I  
23 can't know whether there's a claim or not.

24 THE COURT: I hear you. But what I would say in  
25 response to that, and I do, in my review of the account

1 statements and the turnover rate --

2 MR. MEISSNER: There are no account statements.

3 THE COURT: No, the summaries of the turnover rates,  
4 they were eye openers to me. Now experts might tell me that  
5 those are honky dory, but to me that looked like I don't expect  
6 my entire, the amount of my entire portfolio to turn every  
7 month, and the amount of the fees that were generated, and  
8 particularly when I look at the period of time in which the  
9 fees were generated, gives me a lot of pause. So I agree with  
10 you Mr. Meissner that if you get a stack of trades like this  
11 you're not going to be able to figure out one from the other.  
12 But you can do what I do every month which is I look at that  
13 thing that says account value beginning of month and account  
14 value at the end of the month. And if the number goes up I'm  
15 happy and if the number goes down I'm not happy. Sometimes --

16 MR. MEISSNER: But it doesn't give you a claim  
17 necessarily. It doesn't --

18 THE COURT: But if the number, but if month after  
19 month after month, 2.2 goes down to 2, goes down to 1.6, goes  
20 down to 1.5, I'm on the phone and I'm doing something. And --

21 MR. MEISSNER: Yeah, they're on the phone and they  
22 see NBC, the market is down whatever, and obviously the gist  
23 of what's going on here is they're saying the whole market went  
24 down, and we're saying no, an analysis shows it did not. And  
25 in fact one thing that wasn't mentioned here at all was the

1 fact they were not only invested, they were put on margin, so  
2 that even gave fuel to the fire here, and by the way added to  
3 the costs which is not talked about in the turnover, that  
4 interest adds to cost.

5 THE COURT: I'm going to sustain the trustee's  
6 objection on the statute of limitations basis, but I'm going to  
7 require but not sustain the other objections at this  
8 preliminary stage, and afford the Gales the opportunity to re-  
9 plead consistent with the federal rules. So the statute of  
10 limitations objection is sustained so no claim can be made on  
11 matters that occurred before July of 2002 which is the six  
12 years running backwards from the time that the FINRA claim was  
13 made.

14 To the extent that there are damages that you want to  
15 assert that aren't barred by the application of the statute of  
16 limitations, you need to do that in a pleading. If you also  
17 then wish to make a motion to compel FINRA arbitration for what  
18 remains of the claim you're free to do that as well.

19 What I would like to see happen here is that the  
20 parties get together and talk.

21 MS. HASSAN: Thank you, Your Honor.

22 THE COURT: Mr. Meissner?

23 MR. MEISSNER: Okay. I've talked before but I'll be  
24 happy to talk again.

25 THE COURT: Well, I've given some new parameters to

1 the claim, we have the new prospect of motion to compel FINRA  
2 arbitration, I denied a motion to compel FINRA arbitration just  
3 last week, every case is different, so the trustee ought to  
4 think about that.

5 MR. MEISSNER: That case seemed to be unique to the  
6 bankruptcy court in seeking priority, I think.

7 THE COURT: You could reasonably characterize my  
8 ruling in that way, and that's why I'm suggesting that you  
9 speak to Mr. Meissner given that he's expressed an interest to  
10 make a motion to compel FINRA arbitration, and every case is  
11 different.

12 MS. HASSAN: I understand.

13 THE COURT: But I came out today with the mindset of  
14 being willing to be persuaded on the statute of limitations and  
15 you strived mightily but I'm still where I am on the point, and  
16 certainly the order will preserve that point for any appeal  
17 that you may wish to take at the end of the day.

18 MR. MEISSNER: Okay, thank you.

19 THE COURT: Is that clear? Is there any ambiguity in  
20 next steps? So I'll need an order sustaining the objection on  
21 the statute of limitations ground denying it in all other  
22 respects and affording the claimant the opportunity essentially  
23 to re-plead, and we're behind the sufficiency stage at least at  
24 this level and will have to see what happens next.

25 MR. MEISSNER: If we were going to make a motion to -

1 -

2 THE COURT: You can do that any time you want, but  
3 it's --

4 MR. MEISSNER: That would be before re-pleading.

5 THE COURT: Not necessarily. I mean I think it would  
6 be helpful now that I've ruled on the statute of limitations  
7 piece of having a clear statement of the claim and then you  
8 would essentially be moving to compel arbitration on that  
9 restatement of the claim.

10 MR. MEISSNER: Okay.

11 MS. HASSAN: Thank you, Your Honor.

12 THE COURT: All right?

13 MR. MEISSNER: Is there a date?

14 THE COURT: Pardon me?

15 MR. MEISSNER: There's no date?

16 THE COURT: Well I'll give you a date if you want  
17 one, but I don't want to impose on you, you folks can --

18 MR. MEISSNER: That's fine.

19 THE COURT: You can work together to come up with  
20 some dates, and I would appreciate it if you would have some  
21 conversations to try to figure out if there's a negotiated  
22 settlement that you might come to. All right?

23 MR. MEISSNER: Okay. Thank you.

24 THE COURT: Okay. Thank you very much.

25 MR. MEISSNER: Thank you.

1 THE COURT: You folks are still here? Haven't you  
2 entirely agreed on everything?

3 MR. DAHILL: I thought you might want to talk about  
4 discovery. Mr. Loden and I successfully addressed open issues,  
5 so we've reached --

6 THE COURT: Did you really?

7 MR. LODEN: We got some [indiscernible]

8 MR. DAHILL: We've reached compromise direction on  
9 the discovery issues and we will submit a revised order  
10 reflecting the first part of issues that we addressed  
11 [indiscernible]. Thank you for your assistance.

12 THE COURT: That's terrific. I do personally know  
13 the U.S. Ambassador to Japan, Mrs. Schlosberg, so

14 MR. LODEN: Your Honor, we'll see if that will help  
15 [indiscernible].

16 THE COURT: In light of -- it's true.

17 MR. LODEN: We're shooting for the 24th.

18 THE COURT: Pardon me?

19 MR. LODEN: We're shooting for the 24th of October  
20 for the deposition in Tokyo.

21 THE COURT: Okay.

22 MR. LODEN: We're going to start the process..

23 THE COURT: Okay. In light of what's happening with  
24 Argentina, I definitely don't want to start another  
25 international incident. But thank you very much for working it

1 out. That's delightful. Have a good rest of the day. Thank  
2 you.

3 (Proceedings concluded at 11:34 AM)

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I N D E X

RULINGS

DESCRIPTION

PAGE

Scheduling Conference for

[Adversary Proceeding No. 10-03542]; [Adversary Proceeding No.  
10-03544]; [Adversary Proceeding No. 10-03545]; [Adversary  
Proceeding No. 10-03809]; [Adversary Proceeding No. 10-03811]

HEARING re Doc # 24762, 24881 - Omnibus Application of  
Individual Members of Official Committee of Unsecured Creditors  
and Indenture Trustees Pursuant to Section 1129(a)(4), Or,  
Alternatively, Sections 503(b)(3)(d) and 503(b)(4) of  
Bankruptcy Code for Payment of Fees and Reimbursement of  
Expenses

HEARING re Doc #8408 - Trustee's Objection to the General  
Creditor Proof of Claim of Connie & Curtis Gale (Claim No.  
7000142)

CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

Theresa  
Pullan

Digitally signed by Theresa Pullan  
DN: cn=Theresa Pullan, o, ou,  
email=digital1@veritext.com, c=US  
Date: 2014.08.14 14:19:39 -04'00'

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Theresa Pullan

Veritext

330 Old Country Road

Suite 300

Mineola, NY 11501

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